

Decision **ORDER OF COMMISSIONER PEEVEY TO AGENDA ID 2596****BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Application of the CITY OF RICHMOND for an order preserving the wigwag warning devices at the Richmond Avenue Crossing in the City of Richmond, Contra Costa County, California.

Application 02-05-065
(Filed May 31, 2002)

Wayne Nishioka, Attorney at Law, for
City of Richmond, applicant.

R. Curtis Ballantyne, Attorney at Law, for
The Burlington Northern & Santa Fe
Railway Company, respondent.

OPINION DENYING APPLICATION**1. Summary**

We deny the request of the City of Richmond (City) to prevent removal of the wigwag warning devices (wigwags) at the Richmond Avenue crossing (Crossing) by The Burlington Northern Santa Fe Railroad Company (BNSF). In addition to denying the City's request to stop the removal of the wigwags, we explicitly authorize BNSF to resume work on the Crossing that includes the installation of automatic gate type warning devices. This proceeding is closed.

2. Statement of Facts

2.1 The Application

The City filed an application on May 31, 2002, that sought, in the alternative, to preserve the wigwags as the only operative warning system at the Crossing, or to stop the work begun by BNSF in January 2002 to replace the wigwag warning system at the Crossing. The City's dispute with BNSF arose from BNSF's plan to replace the wigwags with cantilevered flashing light signals with gates conforming to Standard 9-A in General Order (GO) 75-C and constant time warning device circuitry (the replacement project).

2.2 The Setting

The Crossing¹ is located in the Point Richmond area of the City. It is an at-grade crossing at the edge of a rail yard owned and used by BNSF. The tracks cross East Richmond Avenue at the intersection of Richmond Avenue and West Cutting Boulevard. Near the Crossing, West Cutting Boulevard intersects South Garrard Boulevard. Nearby on the other side of the Crossing, Railroad Avenue intersects Richmond Avenue.²

BNSF's switching operations at its yard involve moving engines and cars into the Crossing about 10 to 20 times a day. This movement constitutes less than 10% of the switching activity at the yard. These switching operations are the only current use for the tracks at the Crossing.

¹ The Crossing has CPUC crossing number 2-1190.40 and U.S. Department of Transportation crossing number 029-886-H.

² An aerial photograph of the Crossing area, introduced into evidence by the City at the Evidentiary Hearing (EH), is reproduced as Appendix A.

The Crossing is located within the Point Richmond Historic District, which was entered into the National Register of Historic Places in 1979. The wigwags were placed on the Richmond Historic Register by a City Council resolution adopted on April 2, 2002. BNSF brought suit in Superior Court to invalidate this designation. The trial court ruled the designation invalid. The City has appealed this determination.³

The wigwags have been the warning devices at the Crossing for about 80 years. One top quadrant wigwag is placed on either side of the Crossing on Richmond Avenue. ⁴ A wigwag is a stationary signaling devices that move the circular warning pattern and light at the top of the device back and forth (a “wig wag” movement). It also has bells, which provide warning to pedestrians and motorists. There have been no recorded injuries in the small number of reported accidents between vehicles and trains at the Crossing during the entire time the wigwags have been in use. Accidents involving pedestrians and trains have been reported.

2.3 The Work on the Crossing

BNSF’s predecessor, The Atchison, Topeka and Santa Fe Railway Company, proposed to the City that the equipment at the Crossing be changed to add gates, updated warning lights, and rubberized crossing panels. In May 1993, the City Engineer expressed interest in the project and in seeking federal funding

³ The Administrative Law Judge (ALJ) took official notice of the institution of the litigation at the EH. After the Presiding Officer’s Decision (POD) in this proceeding was mailed, BNSF sought to reopen the record to take official notice of the documents concluding the Superior Court case; the City sought official notice of its notice of appeal of the Superior Court decision. The ALJ granted both requests.

⁴ “Top quadrant” wigwags are suspended from below and wig wag at the top.

for it.⁵ Little else happened until August 1998, when a diagnostic meeting was held among BNSF, City staff, and Commission staff. Although no document memorializing the diagnostic meeting or its results was entered into the record of this proceeding, there is no dispute that the proposed action emerging from the meeting was to undertake the replacement project.

The earlier interest in the replacement project was not sustained by the City. In August 1999, the City Council adopted a motion opposing the replacement project. BNSF then notified the California Department of Transportation (CalTrans), which administers the § 130 program in California, that the railroad would pay the City's 10% share of funding for the replacement project. A meeting among representatives of the City, BNSF, and Commission staff on December 7, 1999 failed to resolve the dispute. In a letter dated June 16, 2000, Commissioner Bilas urged the City's mayor to defer to the view of Commission staff that the replacement project was an important safety improvement at the Crossing.

In order to receive federal funds for the project, in November 1998 BNSF submitted a cost estimate for the project to CalTrans. On December 8, 1999, CalTrans notified BNSF that federal funds had been allocated for the replacement project and issued a "Notice to Proceed" for the work. BNSF notified the City by letter in July 2000 that it would soon be scheduling the work on the replacement project at the Crossing.

⁵ Under a program set up by federal statute, 23 U.S.C. § 130, federal matching funds are made available for various kinds of rail crossing safety improvement projects. This funding is commonly referred to as "§ 130" funds.

BNSF began work on the replacement project in January 2002. The work was approximately 70% complete when the City issued a stop-work order on January 19, 2002, on the basis that BNSF did not have a required encroachment agreement with the City. BNSF has not done any more construction work on the replacement project since the stop-work order.

3. Discussion

3.1 Procedural matters

The City's application is unusual, since the City does not seek our permission to take any action, but rather seeks an order prohibiting certain actions by BNSF. A complaint against BNSF under Pub. Util. Code § 1702 would have presented a procedurally clearer approach. In the interest of having a decision in the existing proceeding, BNSF waived any objection to the irregularity of the City's use of an application rather than a complaint. Although BNSF did not submit plans for the replacement project at the EH, we are quite aware of the proposed changes to the crossing at issue. Because the proceeding was categorized as adjudicatory, the formal problem presented by the use of the application instead of the more appropriate complaint has no practical consequences.

3.2 Safety Issues

Both parties expressed concerns about safety at the Crossing. The City emphasized issues of pedestrian safety and problems caused by trains occupying the Crossing too long. BNSF emphasized the problems of the wigwags failing or needing repair, as well as motorists ignoring the wigwags when activated.

Both parties also presented ideas about possible safety improvements to the Crossing and its operations that, standing alone, do not depend on the completion of the replacement project or on our approval. One safety problem

on which the parties agreed is that of a train entering the approximately 600-foot approach zone to the Crossing and staying there or receding, without clearing the Crossing. Because of the current circuitry used for the Crossing, this causes the wigwags to stay in motion, until the train either clears the Crossing or goes back beyond the 600-foot distance. For much or all of that time, a train is neither occupying nor nearing approach of the Crossing, but the wigwags are activated. This can confuse drivers and pedestrians, potentially leading them to move into the Crossing in the belief that no train will enter it. Constant warning circuitry, which BNSF intends to install as part of the replacement project, will eliminate the problem of continual warning signals if a train stops in the approach to the Crossing. This circuitry can work both with new signals and with the wigwags.

The City noted that the design of the streets leading into the Crossing could be improved. The City could, with relative ease, close off a portion of West Cutting Boulevard and turn the closed-off area into a parking lot. This would reduce the number of approaches to the Crossing for vehicular traffic, as well as create a more perpendicular approach to the Crossing for all traffic.

There is no dispute that the wigwags are old and outdated. If a new crossing were proposed today, a wigwag would not be an accepted warning device by any standard. Though we appreciate the historical significance of the wigwags, we find that wigwags will not provide the sufficient warning to motorists or pedestrians given the traffic situation in today's modern world.

BNSF argues that the wigwags have been and currently are a maintenance problem and that replacement parts are not readily available. We are persuaded by BNSF's pleadings. As with most older mechanical devices, the older it gets, the more prone it is to breakdowns; and as technology moves forward, equipment becomes scarce as manufacturers abandon old technology. In the

interest of public safety, we agree that faulty signal devices should be repaired without delay. Repair and maintenance of warning devices lay squarely with the railroad and, as such, parts and tools should be readily available to them. If at any time, the wigwag compromises the safety of the crossing, it is the responsibility of this Commission to order its removal.

The primary function of the wigwag is as a safety device and we must evaluate its effectiveness as such. As in the preservation of unsafe, historical buildings, restoration or retrofit is required before the public is allowed to enter. It is not prudent, and indeed careless to wait for the building to collapse or for a member of the public to be injured before making this judgment.

Similar to restoration or retrofit, BNSF's proposed installation of automatic gates and constant warning circuitry will upgrade the crossing to current acceptable safety standards set by the California Department of Transportation, the Federal Highway Administration and this Commission.

3.3. General Order 75-C

Protection of grade crossings is governed by GO 75-C. Section 10, headed Removal, Reduction, or Substitution or Addition of Warning Devices, provides:

No railroad shall hereafter remove, change the type, or add an automatic warning device, crossing gate, crossing flagman or other forms of crossing warning device or reduce the hours during which any such warning method is maintained, unless prior consent for such removal, addition, or reduction shall have been secured from this Commission; provided, however, that a flagman on duty to temporarily direct at a crossing during an emergency, may be removed without such consent. Application for consent of the Commission may be in letter form; however, the Commission may require filing of a formal application and a hearing. Upon completion of any approved changes in warning devices, notice of

such change shall be given the Commission within thirty (30) days following the close of the month in which the change is effective.

The City asserts that BNSF violated this requirement by starting work on the replacement project without seeking our prior consent. BNSF does not claim that it applied for consent. Rather, BNSF argues that it did not need to apply for approval at all. Before April 2000, a railroad's decision to change or add crossing protection was not subject to our prior approval. Effective April 6, 2000, however, § 10 of GO 75-C was amended to add changes in the type of crossing protection, or additions or improvements to existing crossing protection, to the actions that required our approval.⁶ Since the replacement project was approved for funding by CalTrans in December 1999, BNSF reasons, it did not need to seek further approval from the Commission after the April amendment. Alternatively, BNSF claims that it effectively received "concurrence" of the Commission in the form of Commissioner Bilas' letter to the City in June 2000.

The City concedes that the prior version of § 10 would not have required our advance approval of the replacement project. It argues that, because work on the Crossing was not begun until January 2002, the current version of § 10 should apply.

We start our analysis by first determining whether work on the crossing commenced before April 6, 2000. If the work started before this date, no explicit Commission approval is needed. If the work started after this date, explicit Commission approval is necessary.

⁶ In relevant part, the amendment added "change the type, or add" to the first sentence of § 10, and deleted a provision at the end that stated, "No consent is necessary for installing additional or improved protection, however." (The April amendment).

A broad interpretation of the terms “removal, addition, or reduction” includes engineering work and other preparatory/design work. From as far back as May 1993, this project has been discussed. In August 1998, a diagnostic meeting between BNSF, City staff, and Commission staff discussed the replacement project. In November 1998 BNSF submitted a cost estimate for the project to CalTrans. On December 8, 1999, CalTrans notified BNSF that federal funds had been allocated and issued a “Notice to Proceed”. All of these events, and the underlying work, took place before GO 75-C was changed. Obviously, there was significant enough work to secure federal funds.

A narrow interpretation of the terms “removal, addition, or reduction” would exclude engineering work and other preparatory/design work. Instead, a narrow interpretation would only look at the physical “removal, addition, or reduction” at a crossing. Using a narrow interpretation, the work did not commence before April 6, 2000.

However, this does not end our analysis under the narrow interpretation approach. As BNSF notes in its Appeal of the Presiding Officer’s Decision, “judicial economy would be better served by a decision on the merits concerning the issues raised by the parties.” (p. 10) The revised GO 75-C requires that the Commission provides its consent before a crossing can be changed. We respectfully take note of the June 16, 2000 letter that was sent by Commissioner Bilas, however, that letter cannot be taken as an action of the “Commission”. Substantially, as the letter notes, Commission staff has been supportive of improving the Crossing. Because safety is of paramount concern, under a narrow interpretation of the terms, we explicitly consent to the railroad’s proposed improvements to the crossing with the installation of modern warning devices.

4. Request for Review and Appeal

The Presiding Officer's Decision (POD) was mailed on April 30, 2003. The POD proposed to grant the City's application to prevent removal of the wigwags. On May 29, 2003, Commissioner Peevey filed a request for review of the POD. BNSF filed an appeal of the POD on the same date. The City filed a response on June 13, 2003 that supports the POD.

The request for review submits that the award of funding for the replacement project by CalTrans indicates that planning work was done on the replacement project prior to the amendment of GO 75-C. As a consequence, according to the request for review, the replacement project should be governed by the earlier version of GO 75-C, which did not require that BNSF receive Commission approval, and the replacement project may now proceed.

BNSF's appeal contends that the POD's analysis of the CEQA issues rests on the validity of the listing of the wigwags on the Richmond Historic Register, which BNSF argues is invalid. BNSF also contends that a decision on the merits of the replacement project can and should be made in this proceeding.

5. Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and Anne E. Simon is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The at-grade crossing at Richmond Avenue in the City of Richmond, California (the Crossing) consists of tracks of the BNSF that cross Richmond Avenue.
2. The Crossing is now used exclusively for switching movements associated with the BNSF rail yard adjacent to the Crossing.

3. For approximately 80 years, the form of crossing protection at the Crossing has been two top-quadrant wigwags placed on either side of the Crossing on Richmond Avenue.

4. In November 1998, BNSF sought from CalTrans federal funding to replace the wigwags with cantilevered flashing light signals with gates conforming to Standard 9-A in General Order (GO) 75-C and constant time warning device circuitry (the replacement project).

5. In August 1999, the Richmond City Council passed a resolution opposing the replacement project.

6. In December 1999, BNSF received a commitment of federal funds for the replacement project from CalTrans.

7. In July 2000, BNSF notified the City that it would soon be scheduling work on the replacement project.

8. In January 2002, BNSF began work on the replacement project.

9. On January 19, 2002, the City issued a stop-work order on the replacement project.

10. At the time of the stop-work order, work on the replacement project was about 70% complete.

11. BNSF has done no further work on the replacement project at the Crossing since the stop-work order.

12. As a warning device, the wigwags are old and outdated.

13. BNSF's proposed installation of automatic gates and constant warning circuitry will upgrade the crossing to current acceptable safety standards set by the California Department of Transportation, the Federal Highway Administration and this Commission.

Conclusions of Law

1. The replacement project is governed by GO 75-C.
2. Prior to April 6, 2000, GO 75-C did not require Commission consent for installing additional or improved protection. After April 6, 2000, GO 75-C requires Commission consent on all projects.
3. BNSF has not received the prior approval of the Commission for the replacement project.
4. BNSF should undertake work on the replacement project on the grounds that it either started work before April 6, 2000 or that this decision provides explicit Commission consent as required by GO 75-C.
5. In the interest of safety, this decision should be effective immediately.

O R D E R

IT IS ORDERED that:

1. The Burlington Northern Santa Fe Railroad Company (BNSF) is authorized to install automatic gate type warning devices and constant time warning device circuitry at the Richmond Avenue crossing (Crossing) in Richmond, California.
2. Application 02-05-065 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

APPENDIX A

Appendix A to Peevey Mod Pod Agenda Dec.